The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession

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THE LIMITS OF COMPULSORY PROFESSIONALISM:
HOW THE UNIFIED BAR HARMS THE LEGAL PROFESSION

BRADLEY A. SMITH

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THE LIMITS OF COMPULSORY PROFESSIONALISM:
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BRADLEY A. SMITH*

I. INTRODUCTION: THE PECULIAR INSTITUTION

"If lawyers, the vindicators of justice, cannot protect their own right of private judgment, surely they cannot preserve their commitment to advocate for the First Amendment rights of others."

The unified bar—where lawyers must join the state bar association as a precondition to obtaining and maintaining a license to practice law—is a system of organization unique to lawyers. No other profession is organized, or has ever seriously considered organizing itself, along similar lines.2

Though states routinely license a wide variety of occupations and professions, and often require the payment of an annual licensing fee by those practicing within the profession, forced membership in an association is unknown outside the bar. Doctors are not required to join the medical society, nor dentists the dental association. Certified public accountants, veterinarians, and architects are free to join, or refrain from joining, their respective professional organizations. The same is true with other licensed professions and occupations.4

The purpose of this Article is to analyze the continued utility and viability of the unified bar in light of modern developments in bar association activities, state regulation of attorneys, and the 1989 deci--

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2. The unified bar was originally referred to as the "integrated" bar, and is on occasion still referred to as such. See, e.g., DAYTON D. MCKEAN, THE INTEGRATED BAR (1963). As the term "integration" is now almost uniformly associated with racial or ethnic mixing, see Michael Reisman, The Integrated Bar Project, YALE L. REPORT (Spring 1993) (discussing elimination of apartheid in the legal profession in South Africa), I have chosen to eschew the term "integrated" bar, in favor of the more modern term, "unified."


4. See id. at n.3.
sion of the United States Supreme Court in *Keller v. State Bar of California*.\(^5\) The article begins with a brief history of the bar unification movement and the theoretical underpinnings of mandatory bar membership. This permits a review of the arguments traditionally raised in favor of mandatory bar membership and establishes a baseline against which to measure the success of unified bars in achieving these objectives. Next follows a review of the history of legal challenges to the unified bar and, more particularly, the legal constraints within which unified bar associations must operate in order to comply with the *Keller* decision.\(^6\) Finally, the article reviews the effects of these legal constraints on the unified bar and the future viability of the unified bar.

The Article concludes that if there ever were any advantages to the unified bar, those advantages no longer exist. There is no evidence to suggest that the public is better served in unified bar states, or that lawyers in unified states are any more competent or ethical than their counterparts in voluntary bar states. To the contrary, voluntary bar states have been at the forefront of consumer oriented legal reform. At the same time, the unified bar hamstrings the profession's legitimate participation in public policy debates. Far from "unifying" the profession, in unified bar states forced membership in the state bar association is itself one of the most divisive issues in the profession.\(^7\)

Further, the very nature of the unified bar is inconsistent with the role of lawyers as the champions of individual rights. Both lawyers, and the public at large, would benefit from the abolition of the unified bar concept in favor of voluntary bar associations.


7. Indeed, the very term "unified bar" is misleading. A better term would be "compulsory bar," because the alternative to the unified bar is not referred to as the "divided bar," but as the "voluntary bar." The fundamental question is not whether the bar should be "unified," but whether there are benefits to society, or the profession, from coerced membership in the bar, and if so, whether such benefits outweigh the intrusions on the First Amendment rights of lawyers not to associate with the organized bar.

II. Brief History of the Unified Bar

A. Unifying the Bar

More so than other professions, lawyers were slow to join professional organizations. By 1929, 65% of the country's physicians were members of the American Medical Association, while only 18% of lawyers had joined the American Bar Association by 1930. During the same decade, all but two state medical societies boasted membership rates in excess of 50% of the state's doctors, whereas three-fourths of state bar associations had membership rates below 30%.

Unable to attract more than a small percentage of lawyers to voluntary associations, some bar leaders naturally began to dream of the benefits of forced membership. The most important early booster of the unified bar was the founder of the American Judicature Society, Herbert Harley. Harley argued that lawyers were slow to organize because differences in the organization and subject matter of their work prevented lawyers from recognizing their common interests. Harley was not shy in suggesting that these common interests included the economic benefits that could flow to lawyers from unification. He believed that a unified bar could fix prices to help make "tongue and buckle meet," and that the voluntary bar was unable to meet the self-interests of lawyers.

Following Harley's lead, early proponents of the unified bar emphasized the benefits of unification to lawyers' self-interests. They argued that a unified bar would benefit lawyers by increasing the membership and financial resources of the bar association; attracting a more diverse membership to the association; setting minimum fee schedules; eliminating control of bar associations by small cliques; allowing for self-governance and self-discipline of the bar; eliminating "free riders;" and allowing lawyers to speak with "one voice" and to

8. Schneyer, supra note 3, at 8.
9. Id.
10. Id.
11. Rector, supra note 6, at 767.
12. Schneyer, supra note 3, at 9. Schneyer notes that Harley was "almost certainly wrong," both because physicians were at least as fragmented as lawyers, and because voluntary bar associations today routinely claim 75% membership rates, although the bar is as fragmented today as ever. Id. at 9-10.
13. This is a classic midwestern, turn-of-the-century phrase for the achievement of prosperity. It refers to hitching a horse to a wagon, not to buckling trousers.
monitor legislation.\textsuperscript{15} Their mouths watering at the prospect of greater membership, finances, and influence, voluntary bar leaders lobbied hard for integration.\textsuperscript{16}

However, supporters of unification were not so crass as to argue merely from the self-interest of lawyers, because this was hardly a basis for formulating public policy. Furthermore, the very reason unification was desired was because so few lawyers seemed to agree that joining the bar association was in their self-interest. Also, supporters of mandatory membership truly believe that a unified bar would yield significant public benefits and serve the private interests of the bar. The unified bar, they argued, would benefit the public through improved professional standards; more effective discipline; a unified voice of expertise on legal issues; and more effective fulfillment of the public obligations of the bar, such as increasing the availability of legal services.\textsuperscript{17}

Despite heavy opposition, the proponents of unification met with considerable success. By 1940, the bar was unified in twenty states, and by 1982, thirty-one states had unified their bar associations.\textsuperscript{18} Generally, unification was done through state supreme court rulemaking, as legislative efforts were blocked by opposition from both inside and outside the profession.\textsuperscript{19}

Early advocates assumed that even though many lawyers resisted unification, such opposition would cease once a unified bar was established and became the norm.\textsuperscript{20} Instead, opposition to unification has grown more embittered and legal challenges more frequent over the last two decades.\textsuperscript{21} The difficulty in resolving the debate stems from fundamental disagreement about the nature of the unified bar.

\textbf{B. Three Visions of the Unified Bar}

Early proponents of the unified bar gave little thought to the nature of the organization that they were creating. Would it be a state agency, a private association, or something in between?

The debate over the merits, morality, and constitutionality of the unified bar has been heavily influenced by three distinct, and often conflicting, visions of the bar: the bar as private association; the bar as a state agency; and the bar as a professional union.\textsuperscript{22}

\textsuperscript{15} See Rector, supra note 6, at 769, and Sorenson, supra note 6, at 36-37.
\textsuperscript{16} Sorenson, supra note 6, at 35-36.
\textsuperscript{17} Id. at 36; see also Rector, supra note 6, at 768, and sources cited therein.
\textsuperscript{18} Sorenson, supra note 6, at 35.
\textsuperscript{19} Id.
\textsuperscript{20} Schneyer, supra note 3, at 3.
\textsuperscript{21} Id.
\textsuperscript{22}
The common historical vision of the unified bar was that of a private association, operating no differently from the voluntary bar associations that existed in most states before unification. From 1920 through 1950, when most state bars underwent unification, it seems to have been the unquestioned assumption of leaders of the unification movement that the bar would continue to function as a private association, despite invoking the coercive power of the state to force membership and extract dues from reluctant colleagues.23

Bar leaders in unified states have generally operated their associations in the same manner as voluntary bars, offering member benefit programs such as insurance and car rental discounts, a member's magazine, and an active lobby aimed at legislation affecting the association's members.24 Unified bars have jealously guarded their independence by resisting legislative or judicial encroachments into the bar's internal and external operations.

When convenient, leaders of the unified bar have often been quick to invoke a second vision of the unified bar, that of a public agency.25 In this vision, the unified bar is a state agency, essentially no different from the state board of education or any other agency, except that its officers are elected by a singular class (lawyers) who pay a special tax (dues) to support the agency's operations. The ostensible purpose of the agency is to regulate the legal profession and serve the legislature as a resource for information and advice on legal issues.26 Unlike the private association model, this model necessarily implies significant oversight of bar operations and budgets by elected politicians, and accountability to the public.

In accordance with the public agency model, unified state bars have in recent years been under pressure to add lay persons to their governing boards.27 Such moves, when successful, may hinder the unified bar's ability to look after its members' direct interests.28 Even when states have not required the presence of "public" representatives on the unified bar's governing body, the trend has been for increased interference in state bar affairs by state supreme courts and legislatures.29

competing views. For readers interested in an excellent detailed discussion of the three models, and the policy implications which flow from each, see Schneyer, supra note 3, at 47-79. The brief description which follows draws substantially from Professor Schneyer's account.

24. Id. at 74-75, 97.
26. See, e.g., Falk I, 305 N.W.2d at 228 (Williams, J., concurring).
27. Schneyer, supra note 3, at 68-72.
28. Id.
29. Id. at 72-75. For example, the Michigan State Bar has found its role in the management
Increased oversight has not generally been welcomed by unified bars, which correctly view closer legislative and judicial oversight as limiting their autonomy.\(^3\) To members of the bar seeking to preserve their institutional independence, the ultimate danger of the public agency model is the creation of a compulsory bar not controlled by lawyers.\(^3\) Therefore, although unified bar leaders have frequently invoked the state agency model to advance the bar's immediate interests, or to quash threats to the bar's mandatory status (usually from a dissident lawyer who challenges the state's right to force membership in the association as a condition of practice), once the immediate need or threat has passed, the unified bar reverts to the vision of itself as a private association.\(^3\)

Between these two visions of a unified bar lies yet a third view, which sees the unified bar as analogous to a public employees' labor union.\(^3\) In this view, the state bar exists to serve its members, who prefer self-regulation to state regulation. Membership is mandated to prevent the "free rider" problem, where some lawyers benefit from the services of the bar, but avoid paying for those services. However, because membership is coerced, the state must periodically intervene to protect the rights of dissenting bar members from abuse by the majority of the organization.\(^3\) This conception of the unified bar creates public policy ramifications different from either the private association or state agency conceptions; ramifications which are explored more fully in the sections that follow.

and budgeting of the Attorney Grievance Commission and Attorney Discipline Board cut back substantially by the Michigan Supreme Court, to the point where the Bar has asked to withdraw from the process completely. Michael Franck, *Crisis and Opportunity Confront the State Bar*, 72 Mich. B.J. 272 (1993).


31. Such an organization existed in Louisiana under Governor Huey Long in the 1930s. There, lawyers were forced to join a unified bar with a governing board elected by the public and not explicitly limited to lawyers. A more conventional unified bar was established after Long's death. Schneyer, *supra* note 3, at 44.

32. Compare the position of the Michigan State Bar in Falk v. State Bar of Mich., 305 N.W.2d at 214 (Falk I) ("The State Bar responds that . . . [it] is rather a 'public body corporate' that operates as a public or state agency."), with, quite literally, any issue of the Michigan Bar Journal and most pronouncements of Michigan State Bar leaders, which routinely refer to the bar as an "organization" rather than an "agency," lawyers as "members," and the membership fee as "dues" rather than a "tax" or "licensing" fee. The Michigan State Bar maintains a "Membership Services Department," and provides such "services" to members as a regular journal and member benefit programs such as insurance and discounts. As one commentator has noted, these are "the stock in trade of private associations." Schneyer, *supra* note 3, at 75. Meetings of the State Bar's Representative Assembly are riddled with references to "protecting the profession" and "speaking for the membership" in the legislature. See, e.g., Marcia McBrien, *Representative Assembly Approves Dues Bifurcation, Establishes 1994 Bar Dues: Identity of Bar at Issue*, Mich. L. Wkly., May 3, 1993, at 1.

33. Sorenson, *supra* note 6, at 54-55.

34. Id. at 54-56.
These conflicting visions of the unified bar—private association, state agency, and union—have created great confusion about the rights of states to force membership, the authority of unified bars to engage in various activities, especially political activities, and the rights of dissenting lawyers to withhold dues from the bar. Perhaps inexorably, or perhaps because the primary players are lawyers, these issues have regularly ended up in court. Unfortunately, the same conflict of visions that confused the issue in the political arena exists in the courts, hindering efforts to answer these questions.

III. THE UNIFIED BAR IN THE SUPREME COURT

A. Lathrop: The Unified Bar Upheld

In the 1956 case of Railway Employes' Dep't v. Hanson, the Supreme Court, ruling on the constitutionality of a union shop provision in a collective bargaining agreement, stated casually, "[o]n the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated [unified] bar." However, far from precluding challenges to the unified bar, the Court's casual pronouncement on the constitutionality of the unified bar, a question which was not before it, marked the beginning of more than thirty years of legal wrangling over the constitutionality of the unified bar.


37. Id. at 238.

38. Constitutional issues surrounding the unified bar had arisen in some state court decisions before Hanson. See, e.g., Board of Comm'rs v. Collins, 59 So. 2d 351 (Miss. 1952). An interesting case is Petition for Rule of Court Activating, Integrating & Unifying the State Bar of Tenn., 282 S.W.2d 782 (Tenn. 1955), in which the State Bar of Tennessee argued that a legislative statute prohibiting a unified bar violated the state constitution because it infringed on the state supreme court's power. The Tennessee Supreme Court refused to order unification after a poll showed a substantial majority of the state's lawyers opposed unification. Today Tennessee remains a voluntary bar, with a substantial majority of the state's lawyers as members. Schneyer, supra note 3, at 10.
Only five years after *Hanson*, the Supreme Court recognized that the issue was more complex than it first appeared. In *Lathrop v. Donohue*[^39], Trayton L. Lathrop, a Wisconsin attorney, argued that his compelled membership and financial support of the State Bar of Wisconsin, which engaged in various political and legislative activities with which Lathrop disagreed, violated his rights under the First Amendment.^[40]

*Lathrop* split the Court into no fewer than five camps. Writing for the four-justice plurality, Justice Brennan found that mandatory membership in a unified bar was constitutional, but that certain political and legislative expenses of such an organization might violate First Amendment rights of free speech.^[41] However, as the record did not reveal any particular political or legislative activities which Lathrop alleged violated his rights, the plurality reserved the question.^[42]

Justice Harlan, joined by Justice Frankfurter, concurred in the judgment, but would have found that the State Bar of Wisconsin's use of compulsory bar dues to promote legislative goals, regardless of the issues prompting such activities, was not prohibited by the First Amendment.^[43] Justice Whittaker concurred only in the result, being of the opinion that, whatever its activities, a mandatory bar did not even raise First Amendment issues.^[44] In essence, the three concurring justices adopted a public agency view of the bar.^[45]

In dissent, Justice Black wrote that the State Bar of Wisconsin's use of compulsory dues for political purposes violated Lathrop's First Amendment rights of free speech.^[46] Although Justice Black and the plurality disagreed on whether or not the case was ripe for decision on all issues, both Justice Black and the plurality seemed to adopt the vision of the unified bar as something akin to a public employees' union. Though membership could be compelled, according to Justice Black, forced dues could not be used in support of ideological causes opposed by members.^[47]

[^40]: Id. Lathrop wrote to the treasurer of the State Bar, "I do not like to be coerced to support an organization which is authorized and directed to engage in political and propaganda activities . . . ." Id. at 822. Neither the Supreme Court's opinion nor that of the Wisconsin Supreme Court indicated the nature of the legislative activities and positions to which Lathrop objected. His dues were $15 for the year. Id.; Lathrop v. Donohue, 102 N.W.2d 404, 406 (1960).
[^41]: 367 U.S. at 844-48.
[^42]: Id. at 847-48.
[^43]: Id. at 848. Harlan found Lathrop's arguments "specious." Id. at 865 (Harlan, J., concurring).
[^44]: Id. at 865 (Whittaker, J., concurring).
[^45]: Id. at 861-64 (Harlan, J., concurring).
[^46]: Id. at 865.
[^47]: Id. at 871 (Black, J., dissenting).
Also dissenting was Justice Douglas, who did Justice Black one better by arguing that any compulsory membership in a state bar association violated the First Amendment right of free association. In Justice Douglas' unspoken vision, the unified bar was best compared to a private association, and forced membership violated the First Amendment.

Despite the fractured nature of the Lathrop opinions, eight of the Court's members, all save Justice Douglas, agreed that some level of compulsory membership was constitutional. The other question posed by Lathrop—what limits does the First Amendment place on the expenditure of compulsory dues income—was left for another day. It would be more than thirty years before that day arrived in the Supreme Court.

B. Keller v. State Bar of California—The Supreme Court Sets a Standard

In Keller v. State Bar of California, the Supreme Court finally returned to the issues left unresolved since Lathrop.

In Keller, members of the unified State Bar of California argued that use of their mandatory membership dues to finance ideological and political activities which they opposed violated their First Amendment rights. Among the activities the plaintiffs challenged were bar association lobbying for or against legislation changing the gift tax to exclude gifts made to pay for education tuition or medical care, creating criminal sanctions for violation of laws pertaining to the display for sale of drug paraphernalia, and requesting Congress to refrain from enacting a guest-worker program for alien labor; filing amicus curiae briefs in cases involving the constitutionality of a victim's bill of rights, disqualifying a law firm from a case, and concerning the power of a workers' compensation board to discipline attorneys; and adopting resolutions on issues such as gun control, a nuclear weapons freeze, and federal court jurisdiction over abortion, public school prayer, and busing for school integration.

The plaintiff's argument hung primarily on a post-Lathrop United States Supreme Court labor law decision, Abood v. Detroit Board of
In *Abood*, the Detroit Board of Education reached a collective bargaining agreement with the local teachers' union implementing an 'agency shop' arrangement. Under this agreement, teachers who chose not to join the union were nevertheless required to pay a union "service fee" as a condition of employment. The plaintiffs, Detroit public school teachers, objected that their compelled dues were used to fund ideological and political lobbying for causes unrelated to collective bargaining and repugnant to their beliefs. The Supreme Court held that the Board of Education, as an arm of the state, could not compel individual teachers to pay dues to support ideological activities unrelated to collective bargaining, and that the plaintiff was entitled to a *pro rata* refund of dues spent on such activities.

In *Keller v. State Bar of California*, the California Supreme Court rejected the labor union vision of the State Bar, instead ruling that the State Bar Association was a state agency, and upheld the use of mandatory dues for all such activities. The United States Supreme Court reversed.

The Keller Court began with a perfunctory statement affirming that, "lawyers admitted to practice in the State may be required to join and pay dues to the State Bar . . . ." However, the Court went on to hold that a unified bar could not use mandatory dues to engage in the full range of activities that might be open to a state agency. In rejecting the state agency vision of the unified bar, the Court found that, "[t]he State Bar of California is a good deal different from most other entities that would be regarded in common parlance as 'governmental agencies.'" It noted that the Bar's revenues came not from legislative appropriations, but from dues income; that only lawyers were members; and that the Bar did not ultimately have the power to admit anyone to the practice of law, nor to disbar or suspend an attorney, nor to establish codes of conduct. It was not created, the Court noted, to participate in the general government of the state, and

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55. 431 U.S. at 212.
56. *Id.* at 213-14.
57. *Id.* at 233-42. It would be several years before the Supreme Court specified minimum standards and procedures by which a union in such a situation could meet its obligations to refund dues pursuant to *Abood*. Teachers v. Hudson, 475 U.S. 292 (1986).
58. 767 P.2d 1020 (Cal. 1989).
59. *Id.*
62. *Id.*
63. *Id.* at 11.
64. *Id.*
its members and officers were not selected because they were citizens or voters, but because of their status as attorneys.65

Rather than viewing the unified bar as a state agency, the Court saw, "a substantial analogy between the relationship of the State Bar and its members . . . . and the relationship of employee unions and their members . . . ."66 Borrowing from the holding of Abood, the Court held that mandatory dues could not be used for activities not "germane" to the purpose for which compelled association was justified.67 In the case of the unified bar, the Court found compelled association justified only by the State's interest in regulating the legal profession and improving the quality of legal services. Only if challenged expenditures were "necessarily or reasonably incurred" for those limited purposes could mandatory dues fund them.68

The Court admitted that the line between permissible and impermissible expenditures of mandatory dues would be murky, but shrugged off any need to provide clear guidance by pointing out that, "the extreme ends of the spectrum are clear."69 Mandatory dues could not be spent lobbying on issues such as gun control or a nuclear weapons freeze; they could be spent for activities connected with attorney discipline and ethical codes.70 The Court then held that a unified bar association would have to develop some procedure to assure that it would not spend mandatory dues income on impermissible activities.71

Finally, the Court concluded by specifically leaving one important issue open. In addition to contesting the expenditure of mandatory dues income, the Keller plaintiffs also had argued that any political or legislative activity by the state bar violated their First Amendment rights. According to the plaintiffs, the compelled nature of their membership in the Bar meant that all political and legislative activity opposed by the plaintiffs and carried out in the name of the State Bar of California violated the plaintiffs' First Amendment rights to free association, including the right of disassociation, regardless of the source of funding.72 The Court declined to address

65. Id. at 13.
66. Id. at 12.
67. Id. at 13-14.
68. Id. at 14.
69. Id. at 15.
70. Id. at 15-16.
71. Id. at 16-17.
72. Id. at 17. The Supreme Court has long recognized that the First Amendment protects the right not to be associated with certain beliefs. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding flag salute by public school children cannot be compelled); Wooley v. Maynard, 430 U.S. 705 (1977) (requiring individual to display motto, "Live Free or Die," on
this argument.\textsuperscript{73}

\textit{Keller} was, at best, a Pyrrhic victory for the unified bar. First, by not addressing the issue of whether the unified bar can lobby under its own name on any issue opposed by even one member, the Court left the unified bar open to future constitutional attack. Second, although \textit{Keller} upheld the concept of the unified bar, it rejected both the private association vision of the unified bar, favored by the bar for administrative purposes, and the public agency vision of the bar, used by the bar to protect itself from internal dissent. By adopting the professional union vision of the bar, the Court required unified state bar associations to develop mechanisms to determine the amount of dues spent on activities for which dues could not be extracted involuntarily, and to allow dissenting members to deduct that amount from their dues.\textsuperscript{74} The result, although not immediately apparent, was to provide unification opponents with the tools needed to render the unified bar unworkable at an acceptable cost. This result first became clear in the State Bar of Michigan in 1992.

IV. \textbf{COPING WITH KELLER}

A. Voting with Their Wallets: The State Bar of Michigan Experience with Dues Deductions

After \textit{Keller}, unified state bar associations began to develop procedures by which members could claim dues deductions for \textit{Keller}-prohibited lobbying. The State Bar of Michigan, fresh off a major legal battle of its own over its constitutional status,\textsuperscript{75} filed an amicus brief supporting the State Bar of California in \textit{Keller}.\textsuperscript{76} After \textit{Keller}, the Michigan Bar became one of the first unified bar associations to implement a system for dues deductions, and to make members aware of this deduction option.

\textsuperscript{73} Keller v. State Bar of Cal., 496 U.S. 1 (1990).
\textsuperscript{74} Id. at 16-17.
\textsuperscript{76} 496 U.S. at 4, n.*
In 1991, the first year in which the State Bar of Michigan allowed dissenting members to deduct dues pursuant to the Keller decision, twenty-four percent of the Bar's members exercised this right. In 1992, the State Bar of Michigan conducted a major campaign to persuade members not to exercise their right to deduct dues, yet 22% of members took the deduction. In 1993, the percentage leaped to 48%. In other words, by 1993, nearly half of Michigan's lawyers were disassociating themselves from positions taken by the State Bar.

Furthermore, although the available evidence is largely anecdotal, there is reason to believe that as members learned more about the Michigan State Bar's lobbying and ideological activity, they became more likely to request a dues deduction. As then State Bar of Michigan Vice-President Jon Muth stated, "the more information we gave, the higher the rate of deductions." Dissatisfaction with the political and legislative activities of the unified bar also was reflected in a non-scientific, mail poll conducted by Michigan Lawyers Weekly in early 1993. The poll results showed that sixty-nine percent of those responding favored a voluntary bar over the mandatory Bar. The primary reason stated for this preference was not resentment of dues, but opposition to the Bar's ideological advocacy. One lawyer responding to the survey attacked the state Bar as, "shill[ing] for plaintiffs." Others wrote that the Bar "does not represent the consensus of its members"; that it was "dominated by

77. Franck, supra note 29, at 277. The State Bar actually allowed members either to deduct the amount spent for impermissible lobbying from their dues, or to divert that amount to the Michigan State Bar Foundation, a non-profit foundation started by the Bar some years previous. In 1991, 4% of the members chose the diversion option. Two percent chose to divert dues in 1992, and 7% in 1993. The remainder of those who objected to the Bar's lobbying activities simply deducted the amount from their total dues. In 1993, the amount of the Keller deduction was $15, or 7.5% of total Bar dues. Id. at 276.
78. Id. at 277.
79. Id.
80. A review of legislative positions taken by the State Bar of Michigan in 1991-92 and the first quarter of 1993 showed nothing that might be construed as particularly radical or unrelated to the law. The bar did not, for example, take positions on any general tax or spending measure, welfare reform, abortion, or national issues. Legislative Report, 72 Mich. B. J. 242 (1993). The only issue that stands out is that of opposition to the death penalty, which the Michigan State Constitution already prohibits.
the Negligence section and other special interests"; and that it does not "strive to present a balanced recitation of facts or law to the issues." Complained one member, "I am embarrassed at the positions the state bar takes."83 While one should avoid placing too much emphasis on a relatively small and self-selected sample, the mail poll supports the conclusion that a significant reason for the steady increase in dues deductions was dissatisfaction with the State Bar of Michigan politics and programs, and not a desire to save the $15 portion of dues supposedly earmarked to lobbying and political activity.

Nevertheless, State Bar of Michigan leaders attempted to defend the Bar's activities. Writing in the Michigan Bar Journal, Executive Director Michael Franck argued that while,

"a significant number of members object generally to our lobbying and other ideological activities . . . . [t]he available data also suggests, [sic] however, that a significant rationale for exercising the deduction/diversion option is simply a desire to reduce the amount which must be paid to retain active membership in the State Bar of Michigan.84

Franck also deplored the practice adopted by some employers of limiting their payments of dues on behalf of their attorney employees to the amount for which mandatory dues could be collected under Keller, leaving it to the individual attorney to pay the optional portion of the dues. Franck argued that such employers were converting First Amendment rights into "a business opportunity."85 Franck's view that economics, rather than ideology, was the driving force behind increased dues deductions, almost certainly applies to some attorneys claiming the dues deduction. However, the complaint seems misguided. For example, the emphasis on the refusal of some employers to pay the full dues for their attorneys misses a basic point about the dues: it is perfectly permissible for individual attorneys who support the Bar's activities to pay the political portion of the dues directly.86 The fact that those lawyers were unwilling to pay even the $15 deduct-

83. Id.
84. Franck, supra note 29, at 276. In fact, Franck cites no data to support his argument.
85. Id.
86. As Christopher DeWitt, a spokesperson for the Michigan Attorney General's Office, says, "If our attorneys want to pay the legislative portion, that's their choice." Marcia M. McBrien, Bar Commissioners to Ask for End to Keller Lobbying, MICH. L. WKLY., Mar. 8, 1993, at 1. The employer's goal, after all, is merely to protect itself by assuring that its attorney employees are properly licensed to practice.
ible portion of the dues indicates that those lawyers did not support the Bar’s ideological activities.87

By the spring of 1993 it was clear that the Michigan State Bar was careening towards crisis. Half of the Bar’s members were “voting,” through the dues deduction option, not to support the bar’s legislative activities. Even if many members were deducting dues for economic rather than ideological reasons, the number was an embarrassment to the State Bar of Michigan and its leadership, for it indicated that members did not feel that the Bar’s activities were worthy of financial support at the existing dues rate. Changes had to be made, lest the Bar find itself with a majority of its members on record as disassociating themselves from the official legislative positions of the Bar.88

What the State Bar of Michigan’s good faith implementation of Keller had done was provide a mechanism to bring disagreement within the Bar to the fore. No longer need any lawyer compromise his beliefs to maintain a license to practice, or, as would be the case in a voluntary organization, to continue to take advantage of other member benefits. Keller provided an easy out that, quite naturally, members used. After considering the Bar’s options, the Board of Commissioners decided to abandon most of the lobbying field by adopting an approach first pioneered by Florida’s unified bar association.89

B. The Florida Solution

In 1984, the Florida Bar Association, a unified bar, took a public position against a state ballot initiative to limit state spending. This prompted a lawsuit challenging the Bar’s use of compulsory dues for such ideological activity.90 Taking the position later adopted by the United States Supreme Court in Keller,91 the United States Court of Appeals for the Eleventh Circuit held in Gibson v. The Florida Bar that while the Bar could lobby for any purpose, it could not use the involuntary dues of dissenting members to support ideological activity unrelated to the administration of justice.92

87. Nor should we assume that all who paid the full dues amount necessarily support the bar’s legislative program. Certainly some attorneys may pay the full amount by accident, from a sense of general obligation to the bar, from habit, from lack of knowledge about the deduction option, or because the bill was routinely paid by a secretary, clerk, or spouse.
88. See supra text notes 81-87.
89. McBrien, supra note 86, at 1.
90. Gibson v. The Fla. Bar, 798 F.2d 1564 (11th Cir. 1986).
91. See supra text accompanying notes 59-70.
92. Gibson, 798 F.2d at 1569-70.
Further litigation then arose over the procedure the Florida Bar adopted to comply with the court’s ruling, with dissenting members claiming the right to an advance dues deduction, and the Bar arguing that it was only required to calculate and rebate dues spent on ideological activity after the fact.\textsuperscript{93} Nine months after deciding Keller, the U.S. Supreme Court granted certiorari to hear Gibson.\textsuperscript{94}

Before the case was heard, however, the Florida Supreme Court issued an order limiting the Florida Bar’s lobbying activities to five areas:

(1) the regulation and discipline of attorneys; (2) matters relating to the improvement of the functioning of the courts, judicial efficacy and efficiency; (3) increasing the availability of legal services to society; (4) regulation of attorneys' client trust fund accounts; and (5) the education, ethics, competence, integrity and regulation of the legal profession.\textsuperscript{95}

As a result, the Florida Bar argued that it could not legally engage in any activities which could not be supported by mandatory dues. Therefore, it followed that no mechanism for advance dues deductions was necessary.\textsuperscript{96} The United States Supreme Court dismissed the writ of certiorari as "improvidently granted."\textsuperscript{97}

In March of 1993, the State Bar of Michigan Board of Commissioners, following the Florida example, recommended to the Representative Assembly that the Bar discontinue all so-called "Keller" activities.\textsuperscript{98} Under this proposal, the Bar would no longer engage in ideological activity that could require a Keller dues deduction. Those opposed to adopting the Florida solution generally argued that the Bar's involvement in a broader legislative agenda was important to the public and to lawyers. Former State Bar President Donald Reisig argued, "Why—when we as a profession are threatened—would we get out of the legislative business?"\textsuperscript{99} Reisig went on to argue that if other members chose to exercise their Keller deduction, "I'll gladly carry my fellow lawyers' load."\textsuperscript{100}

\textsuperscript{96} Franck, supra note 29, at 278.
\textsuperscript{98} McBrien, supra note 86.
\textsuperscript{100} Id.
Against these arguments, those favoring the Florida solution—including most of the Bar's leadership—argued that the Bar could not continue with just 52% of its members supporting its legislative activities. The only alternative to the Florida solution, they argued, was a voluntary bar, which, said one officer, "would really eviscerate the state bar." Said another, "[a]t stake is the continued existence of this organization." In light of the existence of active voluntary bars in nineteen states, however, including the neighboring states of Minnesota, Illinois, Indiana, and Ohio, such doomsday predictions appear extravagant. Yet those opposed to adopting the Florida solution never seriously promoted the obvious alternative—a voluntary bar. From the start, the most vocal supporters of continued Keller lobbying assumed, as did their opponents, that the unified bar must continue, and that a voluntary bar would spell disaster.

In the end, "an overwhelming majority" of the Michigan State Bar Representative Assembly approved the proposal to abandon Keller lobbying and to seek an order from the Michigan Supreme Court essentially identical to that obtained by the Florida Bar, specifically prohibiting the State Bar of Michigan from engaging in Keller-prohibited lobbying. On July 30, 1993, the Michigan Supreme Court issued the requested order, and the state Bar embarked on a new era of limited legislative activity and, it hoped, peace with its dissenting members.

V. IS THE FLORIDA SOLUTION A WORKABLE ANSWER?

On the surface, the Florida solution adopted by the Michigan and Florida bars solves the administrative difficulties posed by Keller and eliminates confrontation over the legal and ideological divisions within bar associations. On closer inspection, however, the Florida solution strips state bars of their ability to undertake many activities voluntary bars perform in other states, and does little to resolve the problems inherent in the unified bar concept as magnified by the Keller decision.

The first problem with the Florida solution is that it shifts, but does not eliminate, the locus of questions concerning the political activities

102. Id. (quoting State Bar Vice President Jon Muth).
103. Id. (quoting State Bar President-Elect Michael Dettmer).
104. See id. (comments of Jerome O'Connor); see also McBrien, supra note 32; Wesoloski, supra note 99.
105. McBrien, supra note 81, at 3.
of the bar and the rights of dissenting members. As in Florida, the Michigan Supreme Court order limits the Michigan Bar's legislative activity to those "reasonably related to" five different areas:

1) the regulation and discipline of attorneys; (2) matters relating to the improvement of the functioning of the courts, judicial efficacy and efficiency; (3) increasing the availability of legal services to society; (4) regulation of attorney trust accounts; and; (5) the education, ethics, competence, integrity and regulation of the legal profession.107

Additionally, compulsory dues may be used to provide "content-neutral" assistance to legislators.108

The problem is that none of these terms is self-defining. It may be easy, for example, to say that a unified bar operating under this rule could not take a stand, pro or con, on proposed rent control legislation. However, suppose that the bar adopted a position supporting a proposal to provide free legal representation to tenants in eviction proceedings or other landlord-tenant disputes. On the surface, this would fall within the third criterion listed above, "increasing the availability of legal services." Yet, many bar members may staunchly oppose such a position. Some would argue that it would encourage marginal or frivolous suits by tenants and thus raise the overall cost of housing to poor people. Others may object that this is a wasteful and inefficient use of societal resources, because the added legal services may provide less benefit to society than spending the money on a different program, or simply reducing spending.109

In evaluating the effectiveness of the unified bar after Keller, the merits of any particular proposal are inconsequential. The point is that taking a position on such an issue would be expected to create an ideological debate every bit as real as the bar taking a position on a "substantive" issue such as rent control itself. The fact that the issue is arguably related to expanding the availability of legal services hardly responds to the complaints of dissenting members that they are being forced to subsidize ideological activities they oppose. Thus, dissenting members still may challenge the bar's activities as going beyond the permissible scope of lobbying activity. Some arbitration

107. Id.
108. Id.
procedure will be needed to address these challenges, and to rebate dues to prevailing complainants.

In fact, this is exactly what has happened in Florida. Although the Florida Bar theoretically engages in no Keller-prohibited lobbying, it still maintains a dues rebate procedure through which members can challenge activities of the Bar as falling outside the bounds of Keller-permissible activity.110

To date, the number of objectors in Florida has been relatively small.111 This seems to reflect the fact that the Florida Bar now takes relatively few public positions to comply with its restrictions on lobbying,112 the rather paltry size of the rebate,113 and the fact that the objector must request a rebate in writing within forty-five days of the publication of the Bar's position.114 Presumably, other states following this approach also will have fewer Keller deductions than otherwise, but the need for a rebate procedure, and the possibility of further litigation, will not go away.

Moreover, any assumption that the number of challenges will remain small may be erroneous, and could depend on many factors. The most important factors affecting the number of challenges are the extent to which unified bar associations refrain from taking political or legislative positions, and the determination of dissenting members to stand their ground and demand dues rebates.

A unified bar adopting the Florida solution would speak out on far fewer issues, including relatively innocuous issues on which it would seem to have obvious technical expertise. For example, during the 1991-92 session of the Michigan legislature, the State Bar of Michigan took positions on fifty-eight pieces of legislation.115 If Michigan's current rule had been in place for that session, the Bar undoubtedly would have acted on far fewer issues. Among the issues which probably would not have qualified for lobbying under the Florida solution would be bills providing for readability of consumer contracts, limiting tort immunity for volunteers of non-profit corporations, allowing corporations to be represented by persons other than attorneys for parking violations, increasing the maximum recovery in small claims

110. FLA. BAR R. 2-9.3(c).
112. The Florida Bar took only 14 legislative positions between the summers of 1992 and 1993. Id.
113. Id. The dues rebate in 1993 was $8.52 plus interest.
114. FLA. BAR R. 2-9.3(c).
court, and revising the burden of proof in cases in which insanity is plead as a defense. This self-imposed censorship is not beneficial to either the bar or the public.

However, despite the scaled back legislative program the new rule requires, one issue that would probably have remained a permissible target of lobbying in Michigan would have been a proposal to adopt the "English Rule" of requiring the losing party in a civil lawsuit to pay the winning party's legal fees. The Bar could justify involvement in the matter under the rubric of expanding the availability of legal services, and possibly as a matter pertaining to the efficiency of the courts and the integrity of the profession. Yet any position taken by the Bar on this issue, pro or con, could be legitimately challenged as being beyond the boundaries of Keller. Adoption of the English Rule was a favorite notion of former Vice President Dan Quayle and has been hotly debated not only in legal journals, but also on editorial pages. Should a significant number of dissenters challenge a position of the Bar on such an issue, the Bar would be forced to continue to refund dues to large numbers of its members, or to engage in an expensive arbitration, possibly followed by further litigation, which it might very well lose.

No matter how much the legislative program of the unified bar is reduced in scope, it is hard to imagine any issue which might not be challenged by dissenting members of the bar as being an impermissible subject for lobbying with mandatory dues. For example, Rule 41 of the Federal Rules of Civil Procedure allows a plaintiff to dismiss a civil lawsuit without prejudice only if done before the defendant's filing an answer, which must normally be done within twenty days of filing the complaint. Some state court systems, however, allow a plaintiff to dismiss a suit without prejudice virtually up until the time of trial. Reform of a state rule to match the federal rule would seem to be precisely the type of narrow, technical issue on which the bar

116. Letter from Michael J. Karwoski, Ass't Exec. Dir. for Programs and Governmental Relations of the State Bar of Mich., to author, July 19, 1993 (on file with the author). These conclusions represent Mr. Karwoski's personal opinions and do not mean the Bar might not have taken a position on some or all of these issues, or that the Bar's Board of Commissioners or Representative Assembly would have agreed that they were permissible subjects for lobbying.

117. Id. Again, this represents Mr. Karwoski's personal opinion, with which the author generally agrees. However, that others might disagree exposes the difficulty of implementing the Bar's new approach.


119. See, e.g., Ohio R. Civ. P. 41.
could expend mandatory dues to lobby. Surely it would seem to fall within "improving the efficiency of the courts." Yet this issue would be highly political, because the federal standard is generally viewed as being more favorable to defendants, and the state standard more favorable to plaintiffs.

Similarly, the opening for providing the legislature with "content-neutral" advice on legislation also provides no safe harbor for bar lobbying. Any conclusion on the merits of legislation, for example, would be prohibited unless the legislation could fit into one of the five categories open for bar lobbying. As seen, this task is more complicated than it first appears. Even a supposedly neutral listing of "advantages" and "disadvantages" of legislation could be challenged by members who view the bar's analysis as one-sided. In the end, the Bar would be able to do little more than point out technical errors of draftsmanship—for example, incorrect citations to other statutory provisions, or failure to specify available remedies. Whether this service is much needed, in light of the legislative staff and other resources already available to lawmakers, is debatable.120 The result of the Florida solution is that, on numerous issues, the entire bar is silenced to protect the rights of a minority, and possibly a very small minority, of members.

Furthermore, though a position taken by the bar might seem to fit within the permissible scope of lobbying, the bar could not rest easy. Although the Supreme Court in Keller found that no dues rebate was needed for lobbying on matters related to improving the quality of justice, logically it is hard to see why the law should compel a person to fund an association's propagation of views with which she or he disagrees, merely because these views relate in some way to the quality of justice and the person happens to be a lawyer. Apparently benign proposals often involve significant philosophical disputes over the role of states in our federal system of government, differing attitudes towards various types of business activity, or divergent beliefs about the economic effects and social wisdom of encouraging or discouraging different types of legal claims. Faced with a specific case involving such a "technical" issue, it would require no significant stretch for the Supreme Court to expand upon Keller and hold that all lobbying is impermissible if undertaken with compulsory dues.121

Legal reform issues simply do not break down as neatly as the collective bargaining issues at stake in the Abood line of cases. Though

120. Sorenson, supra note 6, at 78.
121. Id.
disagreement may exist over union goals, strategies, or tactics, it seems relatively easy to decide whether an issue is concerned with working conditions in a bargaining unit. The same is not true of legal issues. As Justice Ryan noted in his opinion in *Falk I*:

We do not believe that for First Amendment purposes a distinction can be drawn between legislation aimed at issues loosely termed procedural, such as court reorganization and rules of evidence in product liability actions and the like, and those termed substantive. In either category of legislation, the choice of one approach over another is necessarily premise-based and thus subject to contrary opinion or belief.122

A minority determined to test the full extent of its rights could drag the bar into extended arbitration and litigation over virtually every piece of legislation supported or opposed by the bar. The cost to the unified bar of gaining the rather illusory advantages offered by the Florida solution is the unified bar’s abandonment of much of the legislative field on which bar members in voluntary bar states remain eligible to play. Restricting lobbying activities to “non-ideological” matters offers no safe harbor from dissident challenges. At the same time, the restricted subject matter of permissible lobbying forces the bar to remain silent on issues which significantly affect its members, and on which its members might reasonably be expected to offer particular knowledge or expertise to the public. For example, under the Florida solution, the bar will no longer be able to lobby on tort reform, even if a substantial majority of its members favor a particular position on proposed legislation.123 An organized bar also will have to remain silent on issues such as national health care reform, despite the tremendous impact which reform is expected to have on the profession.124 The benefits allegedly gained by forcing lawyers to join the bar hardly seem worth such a high price. And yet, even after paying that high price, the unified bar under the Florida solution will not escape the fundamental controversy which has dogged it for dec-

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122. *Falk v. State Bar of Mich.*, 305 N.W.2d 201, 218 (Mich. 1981) (*Falk I*); *see also Popejoy v. New Mexico Bd. of Bar Comm’rs*, 831 F. Supp. 814, 815 (D.N.M. 1993) (“Plaintiffs’ concern [is] that Bar members are being compelled to subsidize political or ideological activity disguised as being germane to the purpose of regulating the legal profession or improving the quality of legal services.”)


ades—the conscription of thousands of lawyers who do not want to join.

The result of the Florida solution to the Keller problem is that activities and effectiveness of unified bar associations will decline, but this reduction in activity will not pacify many members who object to their mandatory membership. Yet the Florida solution was adopted, both in Florida and in Michigan, precisely because the unified bar had become unworkable in the wake of the Keller decision. In this situation, the question is not simply whether a unified bar is constitutional, but whether it serves any useful purpose that a voluntary association would not.

VI. THE VOLUNTARY ALTERNATIVE

The advantages of coercive membership in a state bar have always been more rhetorical than real. When we compare the track record of the unified bar to the arguments made on its behalf, both during the heyday of the unification movement in the 1930s and in the present, unification appears to be a rather dismal failure. This section examines these arguments in turn.

A. Resources

Traditionally, unified bar supporters have stressed the programmatic advantages a unified bar has over a voluntary organization. Simply put, the argument is that the added resources of coerced dues and membership enable the bar to do more in the way of pro bono programs, legal education, and other programs to benefit lawyers and the public. Actual experience has never supported this argument.

Coerced membership should not be expected to give the bar more access to added human resources. Lawyers who do not wish to give their time to the bar are unlikely to do so because they are forced to

125. See, e.g., Lathrop, 367 U.S. at 822 (quoting plaintiff Trayton Lathrop, "I do not like to be coerced to support an organization . . . ."); McBrien, supra note 82 (quoting Michigan bar member, "Lawyers should be allowed the right to choose whether or not to subscribe to membership in a state bar without the fear of being sanctioned! . . . ."); see also Patricia Heim, The Case for a Voluntary Bar, WIS. LAW., Feb. 1991, at 10, 63. ("Although there is reason to believe that a substantial number of the bar's members, perhaps a majority, oppose a mandatory bar in principle, the 80-plus percent rate of membership in the voluntary bar . . . indicates the willingness of many members . . . to join a voluntary professional organization.").

126. See, e.g., McBrien, supra note 82 (quoting Thomas C. Oren, Communications Director of the State Bar of Michigan, responding to one member's objection to the unified bar by arguing that coerced membership was constitutionally valid under Keller.).

127. See supra text accompanying notes 15-17.

128. Schneyer, supra note 3, at 97-103.
join. Unless states and the courts are willing not only to force lawyers to belong to the bar, but also to commandeer their participation in bar functions and programs, there is no net gain in human resources. In fact, the unified bar dissipates considerable human capital through regular infighting among lawyers who do not want to be members of the bar association and those who want to coerce their colleagues into membership.

Nevertheless, the argument might be made that those members who participate in bar programs will have greater financial resources owing to the coerced dues taken in from other lawyers. However, even discounting the question of what percentage of the unified bar's income is spent accommodating and fighting with fellow lawyers seeking to exit the association, the dues issue is probably overstated. The underlying assumption of those who predict financial disaster for a de-unified bar is that membership in a voluntary bar would decline precipitously, and that the bar would be unable to replace the lost income. Empirical evidence does not support these assumptions.

Voluntary state bar associations have developed other sources of income which have allowed them to reduce their reliance on dues income to a figure well below that of the typical unified bar association. Similarly, voluntary bars, through member benefit programs, have generally been able to maintain membership rates in excess of 70% of the state's lawyers, with some having membership greater than 90%.

To use Michigan again as an example, if we conservatively assume that a voluntary Michigan Bar retained only 70% of its members and

129. See Ron McCrea, Bar at Crossroads: Mandatory or Voluntary?, Wis. B. Bul., July 1988, at 11, 12.
130. See infra notes 132-36 and accompanying text.
131. For example, the State Bar of Michigan receives nearly 80% of its income from member dues. State Bar of Michigan General Fund Statements of Revenues and Expenses, Mich. B.J., June 1993, at 618. In Ohio, dues account for approximately 55% of the voluntary bar's income. Dennis L. Ramey, Association Expands Member Services and Non-Dues Income, Ohio Law., May-June 1993, at 4. Other voluntary bar associations have relied on dues for as little as 30% of revenue. See, e.g., Heim, supra note 125, at 63. This was a decrease in the percentage of income from dues in 1988, the last year of mandatory membership in Wisconsin before a court order made the bar voluntary for a three year period. 1988 Annual Report of the State Bar of Wisconsin, Wis. B. Bul., Nov. 1988, at 35.
132. The membership rate in Minnesota's voluntary state bar has recently been more than 90%, Irvin Charne, The Case for a Mandatory Bar, Wis. Law., Feb. 1991 at 10,15; in Illinois it typically runs 70% or more, Schneyer, supra note 3, at 10 n.49; Indiana's voluntary membership was recently 87%, Marcia M. McBrien, Will Keller Spell End for an Integrated Michigan Bar?, Mich. L. WKLY., Mar. 22, 1993, at 1; Ohio's was 70%, Telephone Interview with Kate Hagan, Ohio State Bar Ass'n (June 30, 1993); and Wisconsin retained 85% membership when it switched from a unified to a voluntary bar in 1988, John Walsh, Looking to The Future, Wis. B. Bul., Dec. 1988, at 57.
continued to rely on dues for 70% of its income, the Bar would face a budget cut of approximately 20%.\footnote{133} In a more optimistic scenario, in which the Bar garnered 80% participation and reduced its reliance on dues to 50% of income, the budget would be cut by only 10%. Of course, the Bar would also no longer have to provide benefits to coerced members who would prefer not to have them, thus reducing some costs. Facing the market discipline of voluntary membership, other administrative savings might be found as well.\footnote{134} Thus, it appears that conversion from a unified to a voluntary bar would result in a modest decrease in income of 10-20%. However, a portion of this decrease could realistically be offset by decreasing administrative costs through market discipline; ending services to disinterested, coerced members; ending infighting with dissenters; and by realizing administrative savings from ending Keller rebates to dissenting members.

This scenario may be unduly pessimistic, given the fund-raising capacity of unified versus voluntary bar associations. A 1983 study for the American Bar Foundation by Professor Schneyer demonstrated that voluntary bar associations are actually \textit{better} able than unified bars to raise money, and usually have a \textit{higher} level of per-member funding than mandatory bar states.\footnote{135} Schneyer hypothesized that the superior fund-raising ability of voluntary bar associations might be the result of a resistance to dues increases in unified bars by those members who would prefer not to be members of the unified bar at all.\footnote{136} It may also be caused by the different nature of the dues payment. Where dues are mandatory, lawyers may view the bar as a taxing authority, to which the less paid the better. Lawyers, generally an individualistic lot, may be more willing to support an increase in fees to their voluntary professional organization than to a perceived taxing authority. In a voluntary bar, members must think about the value of membership and their own commitment to the profession. Thus, the Ohio Bar has successfully attracted many members to pay an amount

\footnote{133} This calculation is based on a 30% membership reduction times the percent of income to come from dues, assumed at 70%. Thus the formula is 0.3 X 0.7 = 0.21. The author assumes that the State Bar will continue to make fee services available to non-members, but does not consider that the non-member fees may rise, creating added income.

\footnote{134} A quick look at staffing ratios, for example, shows that the State Bar of Michigan has approximately 671 members per staff person, while the voluntary Indiana and Ohio State Bar Associations have 909 and 954 members, respectively. Denny L. Ramey, \textit{Comparatively Speaking}, \textit{Ohio Law.}, Jan.-Feb. 1990, at 4. Michigan is not particularly "fat" as state bar associations go; it has a higher ratio of members to staff than does Wisconsin's mandatory bar, or the voluntary bars of Minnesota and Illinois. \textit{Id.} The point is that it is a mistake to assume that every dollar reduction in dues income will result in a dollar decrease in bar programs.

\footnote{135} Schneyer, \textit{supra} note 3, at 14-15.

\footnote{136} \textit{Id.}
far in excess of regular dues to become "sustaining members"—a title with nothing more than honorary significance. These lawyers pay between $60 and $225 extra per year in dues for this designation.

Thus, voluntary bars have proven their ability to attract and hold members, and to increase nondues income. In doing so, they provide themselves with resources at least equal to those of unified bar associations.

B. Programmatic Arguments

Even if the addition of involuntary dues income increases the resources available to a unified bar, there is no evidence that these resources translate into added benefits for either the public or bar association members.

1. Public Benefits

As a constitutional matter, coercive bar membership has been justified on the basis of alleged public benefits accruing from a unified bar. Such benefits, in theory, take the form of better consumer protection and regulatory innovation, improved delivery of legal services, including pro bono work, and better lawyer discipline. In fact, the unified bar has been a disappointment in achieving any of these ends.

Schneyer, for example, found that states with unified bar associations have been slower than voluntary bar states to adopt regulatory programs beneficial to consumers, such as client security funds. Similarly, the country's first mandatory Continuing Legal Education (CLE) program was adopted in 1974 by Minnesota, a voluntary bar state.

Unified bars likewise have not demonstrated an edge over voluntary bars in providing pro bono legal services or in increasing the availability of legal services. This is, perhaps, obvious: who could ever seriously suggested that pro bono legal services for the poor and indigent are more readily available in Michigan, with its mandatory bar, than in Ohio or the other voluntary bar states surrounding Michigan? In

138. Schneyer, supra note 3, at 100.
139. Id. at 99 n.584. Iowa, another voluntary bar state, took initial steps to establish a mandatory CLE requirement that same year. Id. One might argue that mandatory CLE is more valuable in states where bar membership is not compulsory, on the theory that some mechanism other than the bar is needed to assure continuing competence. However, defenders of the unified bar have pointed to mandatory CLE as a benefit of unification, id. at 99, so it is worth pointing out that voluntary bar states led the way in this development.
140. Id. at 101-03.
Ohio and other voluntary states, local bar associations are particularly active in providing pro bono legal services.\textsuperscript{141} Forcing all lawyers to belong to the state bar may inhibit the development of voluntary, local bar associations.\textsuperscript{142} If a mandatory bar hurts enrollment and the level of financial support given to local bar associations, a unified bar may stymie local pro bono efforts. Further, the compulsory nature of dues in a unified bar may make even nondissident members view their dues as a tax, relieving them in some way of their pro bono responsibilities. Thus, a unified bar may actually stifle pro bono activity.

In the field of attorney discipline, unified bar associations may have had some early positive impact.\textsuperscript{143} Voluntary bar states, however, have since made equal strides in self-policing.\textsuperscript{144} Regardless of any past benefit that may have accrued from the unified bar, attorney discipline can hardly serve as a justification for the unified bar today. By 1980, only fourteen of thirty-three unified bar associations played any significant role in enforcing attorney discipline.\textsuperscript{145} Experience has shown that the state can directly assume any role played by a unified bar association with positive results.\textsuperscript{146}

Again, a ready comparison can be found between Michigan and Ohio. Under the new State Bar of Michigan dues structure, lawyers will pay $90 per year to the bar to fund attorney discipline.\textsuperscript{147} In Ohio, a voluntary bar state, attorneys pay $50 per year—to the Ohio Supreme Court—to fund grievance and disciplinary activities.\textsuperscript{148} There is simply no reason a unified bar association must do these functions and, in voluntary bar states such as Ohio, state agencies do them.

Not only can the state effectively assume direct regulatory responsibility over attorney discipline, there are public policy reasons to prefer that it do so. Perhaps the most important of these concerns is the temptation for private groups vested with governmental regulatory

\begin{itemize}
  \item \textsuperscript{141} In the author’s home of Columbus, Ohio, for example, the local bar association recently launched an ambitious pro bono program, known as “Lawyers for Justice,” to supplement the government’s hard-pressed legal aid program. Money for “Lawyers for Justice” came from the local bar foundation. The foundation and bar also have given considerable support to pro bono programs to help juvenile court volunteers, guardians, caseworkers, etc. \textit{Bloomfield New Foundation President}, \textit{DAILY REP.}, Dec. 3, 1993, at 9.
  \item \textsuperscript{142} Heim, \textit{supra} note 125.
  \item \textsuperscript{143} Schneyer, \textit{supra} note 3, at 18-22.
  \item \textsuperscript{144} \textit{Id.} at 18-23.
  \item \textsuperscript{145} \textit{Id.} at 22.
  \item \textsuperscript{146} \textit{Id.} at 23-24.
  \item \textsuperscript{147} Marcia McBrien, \textit{Keller and Bar Dues Proposals Approved by High Court; State Bar Dues to be Set at $250 for 1993-94}, \textit{MIC. L. WKLY.}, Aug. 9, 1993, at 1.
  \item \textsuperscript{148} \textit{OHIO Gov. BAR R. VI, Sec. II(A)} (Attorneys pay $100 biannually, which covers attorney discipline and registration.)
\end{itemize}
power to use that authority to stifle competition or dissent.\textsuperscript{149} Placing the public power to discipline attorneys into the hands of what is basically a private, autonomous organization is problematic, at best. On one hand, members may seek to use the disciplinary process for anticompetitive or other illegitimate reasons. At the other extreme, the association may unreasonably seek to protect members from punishment or exposure.

As a result of these conflicts, states have reasserted control over regulation of the legal profession. As they have done so, unified bar associations have found themselves at a disadvantage compared to voluntary bar associations. In Michigan, for example, the State Bar has been stripped of any meaningful role in attorney discipline. Yet State Bar dues remain the primary source of funding for the Michigan Attorney Grievance Commission & Attorney Discipline Board.\textsuperscript{150} Even as these bodies rely on the Bar for funding, the Bar has lost the ability to set the budget for these committees, which the Michigan Supreme Court now determines.\textsuperscript{151} In other words, the state regulates attorney discipline, then sends the bill to the State Bar of Michigan. Were lawyers to create an attorney disciplinary system from scratch, it is hard to believe that this would be their model.

From a standpoint of effective public regulation of the profession, the unified bar poses a fundamental problem for states. Because the unified bar operates as a private organization, invoking state power primarily for coercing membership dues from other lawyers, it must be regulated closely to prevent the abuse of delegated power. This state oversight of the bar is conducted less for the broader public good, however, than to protect the rights of dissenting lawyers trapped in the unified bar. In a voluntary bar state, on the other hand, the state can directly assume its proper regulatory functions aimed at protecting the public interest. Voluntary bar associations are then free to tend to the broader issues of improving professional standards, and to promoting voluntary pro bono, educational, and other programs. In this way, the voluntary bar benefits from clear lines of demarcation between state authority and private action, eliminating any necessity for the state to intervene in the private operations of the organization except when necessary for some higher public good.

\textsuperscript{150} Franck, \textit{supra} note 29, at 273.
\textsuperscript{151} \textit{Id.}
Thus, in the wake of *Keller*, the unified bar is less likely to serve the public interest than the voluntary bar.

2. Private Benefits

In addition to public benefits, private benefits accruing to members of the profession are often claimed for the unified bar. Once again, these assertions are not supported by evidence.

The disadvantages of unification to the state bar associations should now be apparent. *Keller* has added significant management difficulties and may have made effective legislative activity impossible. The Florida solution, hailed as a remedy, merely doubles the problem. By adopting the Florida solution, as the Michigan bar has, state bar associations leave themselves with a smaller role in public affairs than they would have if they simply complied with *Keller*. This role is already less than that which could be played if the unified bar chose, instead, to become a noncoercive association.152

Moreover, the Florida solution is not likely to stop the infighting over the bar's activities and the compulsory membership of unwilling attorneys. Bar associations adopting the Florida solution will face regular arbitrations against their own members, or continue to refund dues to any lawyer making such a request.153 To the extent that efficient bar association administration and a strong legislative program are beneficial to the private bar, unification is a handicap, not a strength.

Proponents of bar unification continue to argue, as did their predecessors,154 that these administrative difficulties are offset by the benefits of unification to lawyers. Such alleged benefits may include insurance, discounts on both personal and professional products and services, the inculcation of professional values, and greater diversity in membership and opinion. Such private benefits are not usually considered a sufficient basis to invoke the coercive power of the state to force individuals to join an organization.155 However, even if they were, it is not clear why coercion is necessary in the case of the bar.

Material private benefits such as insurance, credit cards, car rental discounts, and other financial savings are prevalent in voluntary associations.156 Indeed, voluntary associations may be more likely to offer such benefits to attract members. Like its Michigan counterpart, for

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152. See *supra* text accompanying notes 123-24.
153. See *supra* text accompanying notes 107-12.
154. See *supra* text accompanying notes 14-16.
156. *Id.* at 98.
example, the voluntary Ohio State Bar Association provides its members with access to insurance, discounts, continuing legal education programs, and a periodic magazine-type publication. However, Ohio State Bar members also receive a weekly magazine with updates on legislation and the full text of newly reported state court opinions—a service no unified bar in the country provides. The Ohio State Bar carries on an active legislative program and a mentor program for young lawyers. It assists lawyers with ethical or substance abuse problems and sponsors numerous public education programs. The Ohio State Bar is able to do this despite a relatively low membership rate—compared to other voluntary bar states—of approximately 70% of the state’s attorneys. The American Bar Association, and many local associations, also offer savings on various services to their members. Thus, tangible financial benefits offered by unified bar associations are insufficient, both in theory and in practice, to justify coercive membership.

In addition to membership services offering tangible savings or products, unified bar supporters often argue that there are intangible advantages to the unified bar that justify its existence even if it provides no tangible programming benefits. Here, too, such advantages seem illusory, at best.157

One such claim is that a unified bar allows the profession to speak with one voice.158 In light of the long-term friction within the legal community over the unified bar, and in particular its political activity,159 this argument may turn reality on its head. The unified bar, in fact, heightens the tensions within the profession and makes suspect the level of membership support for every position asserted by the bar. Where members cannot “vote with their feet,” it is difficult for lawmakers or the public to know the true level of support for the bar’s stated position.

At the same time, a unified bar can exaggerate the degree of disension within the profession by assuring a fractured voice. This occurs because, since Keller, a dissident attorney in a unified bar can request a dues deduction at no cost. If a member disagrees with any position of the bar strongly enough, that member can collect a rebate, even though he or she may agree with a majority of the positions of the bar. The dissident attorney need not give up benefits of bar membership, nor the right to try to shape bar policy on other issues of concern.

157. *Id.* at 104.
158. Sorenson, *supra* note 6, at 37.
159. *See supra* notes 7, 35; Smith, *supra*, note 7.
In contrast, under a voluntary system, an attorney who disagrees with a bar position must either pay the full dues, or leave the association entirely, thereby forfeiting member benefits and the opportunity to engage in further policy discussions on the issue in question, or on other issues. This gives a member a strong incentive not to leave the association because of disagreement over a few, or even all, positions taken by the bar. The voluntary bar forces lawyers to concentrate energies on common interests, not disagreements, and presents the public with a more unified voice. The unified bar, especially since Keller, must first trim its remarks to meet the subject matter on which it is authorized to spend mandatory dues, and then hope that its dissidents won’t undercut it by demandingrebates. The Florida solution does not alleviate this problem, but exacerbates it. Under Keller, the bar’s public pronouncements are limited only if financed by mandatory dues. The Florida solution, by limiting the bar to a narrow range of subjects which purport to relate directly to the administration of justice, restricts the subject matter the bar may address with voluntary, as well as mandatory, dues.

It has also been argued that unification is necessary to assure that all lawyers are steeped in the tradition of the law and that lawyers’ professionalism is carefully nurtured throughout their careers. Proponents of unification rarely explain how this comes about. Presumably, they would argue that a unified bar can succeed where a voluntary bar cannot because it can force “unprofessional” lawyers to associate with unified bar activists, who theoretically represent the highest professional standards. Professionalism, however, does not come from being conscripted into an organization a lawyer would prefer not to join. Resentment of the profession’s norms, as determined by the unified bar, seems the more probable result. The unified bar cannot force enthusiastic participation, and more likely invites only sullen, involuntary association. Even if a bar is prepared to force lawyers not just to join, but to participate in the bar, it is hard to see how mandatory membership will raise professional standards.

Furthermore, the argument is based on an antiquated perception of reality. When the unification movement began in earnest in the 1920’s, thirty-two states had no formal educational requirements to practice law. As late as 1927, not a single state required attendance at law school before being admitted to the bar. Today, with few

160. Cf. Sorenson, supra note 6, at 36; Charne, supra note 132, at 12.
161. Heim, supra note 125, at 61.
162. LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM at 104 (Robert MacCrate ed., student ed. 1992) [hereinafter CONTINUUM].
163. Id.
exceptions, lawyers in the United States must first pass through the bonding experience of three years of law school before being allowed to sit for a state bar examination. Many states require continuing legal education, including an ethics component. Also, the large majority of lawyers in voluntary states belong to either their state association, a local association, or the American Bar Association. All attorneys are subject to the general disciplinary authority of the courts. Thus we find that lawyers are, at the inception of their legal education and throughout their careers, imbued with professional norms. Ohio, Indiana, Minnesota, New York or Illinois lawyers would hardly take seriously the assertion that they are less professional because their states lack mandatory bar associations. Similarly, it is doubtful that many Michigan, Florida, or California lawyers, including those in favor of a unified bar, would feel that their own level of professionalism would be diminished if they could no longer coerce their colleagues into the association.

In addition to raising standards of professionalism, it is sometimes argued that the unified bar assures participation of women, minorities, and rural attorneys in the bar. The notion seems to be that either the leaders of the voluntary bar will discriminate against women and minorities, or that women and minorities will not recognize the benefits of bar membership and so, absent compulsion, will not join. This seems ironic, as it is leaders of the bar themselves who offer this as a rationale for unification. One suspects that if discrimination is

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164. Id. at 100; Roger C. Cramton, Partners in Crime: Law Schools and the Legal Profession, The Bar Examiner, Nov. 1993 at 8. Only four states (California, Vermont, Virginia and Washington) permit an individual to sit for the bar exam without some law school education. These states require a corresponding time in law office study. Few students choose to go this route. Continuum, supra note 162, at 100. Maine, New York, and Wyoming permit a combination of law school and law office study. Again, few students choose this route. Id.

165. Continuum, supra note 162, at 108.

166. For data on membership rates in voluntary bar states, see supra note 132. Additionally, the American Bar Association includes 370,000, or roughly 49% of the country’s lawyers. David M. Leonard, The American Bar Association: An Appearance of Propriety, 16 Harv. J.L. & Pub. Pol’y 537, 558 (1993). Also, many lawyers belong to local bar associations and other professional organizations such as the Association of Trial Lawyers of America. Presumably, there is significant overlap in membership, but there must be some lawyers who belong to the ABA, local bar associations, or other professional groups while not joining the voluntary state bar association.


168. McCrea, supra note 129, at 12; Charne, supra note 132; Sorenson, supra note 6, at 36-37.

169. See, e.g., McCrea, supra note 129, at 12 (quoting Linda Balisle, a member of the Board of Governors of the State Bar of Wisconsin); Charne, supra note 132 (writing for a Committee appointed by the State Bar of Wisconsin to argue for unification.).
truly a concern of these leaders of the bar, there is little danger that they will discriminate in the absence of unification. The argument that women and minorities will not recognize the benefits of participating in the bar hardly merits serious discussion. If the benefits of membership exist, women and minorities will take advantage of them. If such benefits do not exist, coercion is hardly justified.

Similarly, the premise that forced association with the bar will result in participation and a sense of inclusion for underrepresented groups seems obviously incorrect. In fact, it seems more likely that the opposite is true: a unified bar able to force under-represented groups to pay membership dues has little incentive to develop programs or sensitivity to the concerns of these groups. Voluntary bars, on the other hand, must reach out to truly include such groups. The Ohio State Bar Association, for example, recently completed a study of women in the profession, devoting an entire issue of its members' magazine to a report of the results.170

In summary, there is no reason to believe that lawyers in unified bar states benefit from their state associations in ways that lawyers in voluntary bar states do not. Nor are there any apparent public benefits. Indeed, unified bar states seem to lag behind voluntary bar states in protecting the public.171

C. The Wisconsin Experience

Although there are no obvious benefits from unification, and several handicaps, anyone asserting that the unified bar damages the profession must nevertheless deal with the Wisconsin experience. Wisconsin recently returned to a unified bar system after a brief experiment with a voluntary bar. For many, this is the Rosetta Stone that demonstrates the superiority of the unified bar.172 On closer examination, the Wisconsin experience shows no such thing.

After many years as a unified bar, Wisconsin, pursuant to a 1988 United States District Court ruling, dropped its mandatory bar membership requirement.173 For four years, the Wisconsin bar functioned

171. See supra text accompanying notes 138-39.
172. See, e.g., McBrien, supra note 82 (quoting Thomas C. Oren, Communications Director of the State Bar of Michigan, "The Wisconsin bar found that an integrated bar served the public interest better than a voluntary bar. The superiority of the mandatory bar isn't merely conjecture; it's supported by real-life experience.").
as a voluntary association. *Keller*, which affirmed the constitutionality of a unified bar, provided that mandatory dues were not expended for political activities unrelated to the administration of justice and the legal profession, opened the way for reunification. After *Keller* the Wisconsin Supreme Court, which had upheld the unified bar against frequent challenges before the 1988 federal court ruling, again conditioned the practice of law on membership in the State Bar of Wisconsin.

Though the request for a unification order came from the State Bar, Wisconsin's experience with a voluntary bar should hardly be interpreted, as many have attempted to do, as a failure. During four years of voluntary operation, Wisconsin's bar membership remained very high, in excess of 80%. The bar moved much more aggressively into the provision of CLE programs than it had in the past, reduced its reliance on dues income, and remained financially sound. There was no reported increase in disciplinary actions or ethical violations.

When the Bar's leadership considered reunification after *Keller*, the Bar's executive director opposed reunification. No formal survey or vote was taken of Wisconsin lawyers. At the time, membership was running at approximately 80%, and it is fair to assume that the overwhelming majority of those who had not joined the voluntary bar opposed reunification. Thus, even if Association members had favored reunification by a 60 to 40% margin, the reunification would probably have been opposed by a majority of the state's lawyers. In fact, many observers believe that a majority of Wisconsin lawyers, especially younger lawyers, opposed reunification. In 1978, the State Bar of Wisconsin had gone to court rather than allow its members to vote on whether to remain a mandatory bar. Despite the Board of Governors' efforts, a referendum was taken. The vote was 2820 (or 59%) against unification, to 1892 in favor of continued unification. The Board still refused to recommend the discontinuance of unification at the time.

After *Keller's* pronouncement that a unified bar was constitutional, the Board of Governors sought reintegration. Like the Board, the

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174. Walsh, *supra* note 132, at 57.
175. Heim, *supra* note 125.
176. Telephone conference with Patricia Heim, Chair of the Special Committee to Recommend a Voluntary Bar (Sept. 23, 1993).
178. *In re* Discontinuation of State Bar, 286 N.W.2d 601, 602 (Wis. 1980).
Wisconsin Supreme Court, which ruled on the petition to reintegrate the bar, had long favored unification.179 It was, as one Bar member and supporter of a voluntary bar stated, "always a foregone conclusion that the Board would request and the Supreme Court would order reunification."180 Interestingly, a committee appointed by the Bar to argue for reunification did not, in its report, cite a single program or issue which had been rendered ineffective, reduced in scope, or discontinued by the court-ordered move from a unified to a voluntary bar in 1988.181

Thus, the Wisconsin experience, though often misrepresented as proof of the superiority of a unified bar,182 in fact shows just the opposite—the Wisconsin State Bar carried on quite successfully for four years as a voluntary organization.183

Unified bars should be evaluated on their merits. Unless supporters can point to real benefits, the intrusion on the rights of lawyers cannot be justified. The fact that the Wisconsin Bar's Board of Governors and State Supreme Court were eager to return to coerced membership does not represent a victory for the effectiveness of the unified bar, but merely a political victory for those who favor unification.

D. First Principles

Any discussion of the public and private benefits of unification is necessarily carried on against a backdrop laden with premises. To many supporters of the unified bar, unification raises no serious issues of individual rights. In this line of thinking, it is enough that in Keller,

179. See, e.g., Levine v. Heffernan, 864 F.2d 457 (7th Cir. 1988), cert. denied, 493 U.S. 873 (1989); In re Discontinuation of State Bar, 286 N.W.2d 601 (Wis. 1980); Lathrop v. Donohue, 102 N.W.2d 404 (Wis. 1960); In re Integration of the Bar, 77 N.W.2d 602 (Wis. 1956).
180. Heim, supra note 176.
181. Charne, supra note 132. It is interesting to compare the Committee's report to the predictions made by unified bar supporters immediately after the court decision which temporarily abolished the unified bar. The fears expressed at that time included huge membership losses, massive dues increases, mass dropouts of minorities, women, and small town lawyers, and sparsely attended programs. These fears did not apparently occur, but the Committee called for reunification anyway, offering conclusory statements about the benefits of unification. See McCrea, supra note 129.
182. See McBrien, supra note 132 (Becky Weiner, Public Relations Coordinator for the State Bar of Wisconsin, said that the impetus for the Bar's move to voluntary status was the Keller limitation on bar funding (in fact, it was the court order in Levine, 679 F. Supp. at 1502), and implied that the decision to return to a unified bar was based on a member survey supporting such a choice (it was not, supra text accompanying note 176)).
183. Heim, supra note 125; Levine, supra note 7; cf. Charne, supra note 132 (arguing for reunification of the Wisconsin bar, but failing to cite a single program or tangible benefit which was not maintained while the bar functioned voluntarily).
the Supreme Court upheld the concept of mandatory membership in the bar, provided that mandatory dues were not used to support certain political and ideological activities. For some, this positivist approach settles the issue: the Supreme Court has spoken and further talk of rights violations is frivolous. To many lawyers, however, the unified bar would remain a burr even if it engaged in no political activity whatsoever, and even though these lawyers might happily join the same organization on a voluntary basis. To some, the very idea of forced association is anathema, regardless of the nature of the association. To others, forced association is distasteful because of the association’s political beliefs, even if their dues are not expended on the political activity.

Lawyers who object to a state bar’s advocacy of positions with which they disagree are unlikely to be mollified by a small dues deduction. It seems clear that the gravamen of dissenting lawyers’ complaints comes not from the dollar support which they must give to positions they oppose, but from a more deeply rooted opposition to being forcibly linked with positions of the state bar through compulsory membership.

The unified bar has generally responded to this complaint by arguing that dissenting members remain free to express their views individually, and the public does not presume that all members agree with the bar’s official position. But surely this response misses the point. The fact is, lawyers are compelled to associate with those whom they may prefer not to associate, and are linked in the minds of many to views they do not espouse.

No one would seriously suggest that if lawyers were forced to join the Ku Klux Klan as a condition of practice, their concerns about forced association would be insignificant because they could individually dissent from Klan positions. Conceding that state bar associations are less odious to most people than the Ku Klux Klan does not eliminate the sense of invasion felt by those lawyers who would prefer not to link themselves to their state bar association.

184. See, e.g., Charne, supra note 132.
185. See supra text accompanying notes 176-79.
186. See Smith, supra note 7, at 11 (District of Columbia Bar members objecting to the District’s unified bar filing an amicus brief in antitrust litigation received a dues rebate of 15 cents.).
188. One can articulate reasons for forced bar membership (though they lack merit), but it is virtually impossible to articulate a rationale for forcing lawyers to join the Klan. The point here is not on the claimed benefit to the state, but on the individual harm to attorneys. If the Klan seems too strong or remote an example, imagine how angry most would feel if forced to join Operation Rescue, the National Rifle Association, or even Common Cause.
For lawyers, the traditional defenders of individual liberties, to force colleagues into an association they would prefer not to join, seems incongruous at best and hypocritical at worst. There are still idealistic women and men graduating from American law schools, and many will not readily accept such conscription. Even those who see nothing wrong with forced membership in the bar must come to grips with these deeply held beliefs of their colleagues. Insistence on perpetuating the unified bar will remain a source of controversy and division within the legal profession.

V. Conclusion

Today, eighty years after Herbert Harley began the unification movement, arguments for its continued existence ring surprisingly hollow. Few, if any, seriously argue that legal services are more affordable or available, that lawyers are better trained, the public better protected from malpractice, that justice is better served, or that attorneys or the legal system have a higher degree of prestige, legitimacy, or professionalism, in mandatory bar states, than in states which operate with voluntary bar associations.

Further, against the lack of visible advantages, there are obvious disadvantages to the unified bar. Keller limits the scope of activities a unified bar can address, while increasing the administrative burdens on the bar and promoting conflict rather than compromise. The Florida solution, adopted in Florida and Michigan, further restricts the bar from addressing public issues that lawyers would otherwise be entitled to and should address, which voluntary bar associations in other states do address, and on which the public may benefit from the knowledge or expertise of lawyers. Under Keller, the Bar is required to maintain a complicated rebate and arbitration procedure to refund dues to dissenting members. The unified bar is subjected to, and its activities restricted by, greater public oversight than that faced by voluntary associations. That oversight, however, is not linked to any perceived public benefit, but to protecting the rights of the bar's captive members.

Finally, the unified bar is a constant source of friction between those lawyers who want out of the association and those who would force them to remain. Unified bar associations in Michigan, New

189. Rector, supra note 6, at 767.
Mexico, Wisconsin, the District of Columbia, and Florida have all seen struggles for a decade or more within the profession over the ability of the bar to coerce and use member dues. Numerous other state bar associations have faced court challenges and regular infighting over the insistence of some lawyers on forcing their colleagues to belong to the bar.

It was once argued that while unification might meet initial resistance, once it became an accomplished fact it would be readily accepted by lawyers. This has not come true. To many attorneys, it seems, the unified bar represents a betrayal of the historical role of lawyers. As the United States District Court for New Mexico noted in Popejoy v. New Mexico Board of Bar Commissioners, lawyers have a special obligation to support the rights of individual conscience and choice. Forced membership in the state bar, regardless of its constitutionality, is contrary to this obligation and to the bar's heritage.

Lawyers have historically been the champions of individualism, free speech, and free association in America. The dogged insistence of lawyers such as Trayton Lathrop and Allan Falk to enforce these rights, and the corresponding protections recognized by the Supreme Court in Keller, have rendered the unified bar both ungovernable and ineffective at an unacceptable price. It is no longer sufficient to argue that the Keller decision, though restricting the use of mandatory dues, upheld the basic validity of a unified bar. Whether one argues from first principles, or takes the unified bar on its own utilitarian terms, a return to a voluntary bar is in the best interests of both lawyers and the public.

191. Arrow v. Dow, 636 F.2d 287 (10th Cir. 1983); Popejoy v. New Mexico Bd. of Bar Comm'rs, 831 F. Supp. 814 (D.N.M. 1993);
192. See Schneyer, supra note 3; Levine, supra note 7; Charne, supra note 152.
194. Gibson v. The Fla. Bar, 906 F. 2d 624 (11th Cir. 1990); Gibson v. The Fla. Bar, 798 F.2d 1564 (11th Cir. 1986).
195. See cases cited supra notes 35, 38; Smith, supra note 7.
196. Schneyer, supra note 3, at 3.